IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

SHELLEY ANN TISCHLER,

Plaintiff,

vs.

JO ACTON, Warden of Billings Women's Prison, et. al.

Defendants.

Cause No. CV 07-173-BLG-RFC-CSO

FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE TO GRANT DEFENDANTS' MOTION TO DISMISS COMPLAINT

Plaintiff Tischler is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Tischler alleges that the staff at the Montana Women's Prison harassed her, mistreated her and discriminated against her because she is Jewish.

Currently pending is Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies. (Court's Doc. No. 22). Defendants contend Tischler did not complete the grievance process at the Montana Women's Prison and therefore failed to exhaust administrative remedies.

I. Standard of Review

The Ninth Circuit has ruled that, "the failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) (citing Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 368 (9th Cir. 1988)(per curiam)). The failure to exhaust administrative remedies "should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment." Ritza, 837 F.2d at 368-69. In deciding such a motion to dismiss for failure to exhaust, "the court may look beyond the pleadings and decide disputed issues of fact." Wyatt, 315 F.3d at 1120. Where a fact dispute exists concerning whether the plaintiff exhausted administrative remedies, "the court has a broad discretion as to the method to be used in resolving the factual dispute." Ritza, 837 F.2d at 369 (quoting Moore's Federal Practice ¶ 56.03, at 56-61 (2d ed. 1987)).

In civil rights cases where a litigant is proceeding pro se, the court has an obligation to construe pro se documents liberally and to afford the

pro se litigant the benefit of any doubt. Erickson v. Pardus, 551 U.S. 89, 127 S.Ct 2197, 2200 (2007) (per curiam); Baker v. McNeil Island Corrections Ctr., 859 F.2d 124, 127 (9th Cir. 1988).

II. Analysis

Defendants move to dismiss Tischler's claims because she failed to exhaust her administrative remedies as required by the Prison Litigation Reform Act ("PLRA"). The PLRA's exhaustion requirement states:

> [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a); see also Porter v. Nussle, 534 U.S. 516, 524-25, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002); Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). This exhaustion requirement is mandatory. Booth, 532 U.S. at 741. Because the PLRA is applicable, Tischler had to exhaust all available administrative remedies prior to filing this lawsuit.

According to the Affidavit of Charlotte Dolezal, the Montana Women's Prison (MWP) procedure on inmate grievances is set forth in MWP

Procedure No. 3.3.3. (Court's Doc. No. 23-2, p. 2, ¶ 3). This policy provides four levels in the grievance process. (Court's Doc. No. 23-3, DOC Policy No. 3.3.3). First, the inmate must try informal resolution of her complaint. If that is unsuccessful, the inmate must file a formal grievance, which is investigated and answered by Ms. Dolezal, the grievance coordinator. The policy then provides for two levels of appeal, to the Warden and to the Director of the Department of Corrections. (Court's Doc. No. 23-3: DOC Policy No. 3.3.3, pp. 2-5).

Ms. Dolezal testified Tischler typically files informal and formal grievances but rarely filed grievance appeals to the Warden or to the Director of the Department of Corrections. (Court's Doc. No. 23-2, p. 2, ¶ 5). Ms. Dolezal searched the MWP grievance records and found Tischler filed only one grievance appeal to Warden Acton.[1] This grievance appeal was filed in March 2008,[2] and was an appeal to Warden Jo Acton

[1]Tischler submitted with her Fourth Amended Complaint several grievances addressed to Warden Acton. However, none were listed as appeals and she produced no appeals addressed to the Director of the Department of Corrections.

[2]Even if Tischler had fully exhausted this March 2008 appeal it would not change the result herein. The PLRA requires exhaustion be completed prior to the filing of the Complaint. Tischler's Complaint was filed December 28, 2007. See McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002).

complaining that Tischler should be transferred to a prison in another state. (Court's Doc. No. 23-2, p. 2, ¶ 6). Ms. Dolezal did not find any appeals to the Director of the Department of Corrections.

The United States Supreme Court has clarified that, "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." Woodford v. Ngo, 126 S.Ct. 2378, 2386 (2006). The Court held further that "[proper exhaustion] means . . . a prisoner must complete the administrative review process in accordance with the applicable procedural rules . . . as a precondition to bringing suit in federal court." Id.

On November 17, 2008, Tischler filed what was initially construed as a response to Defendants' Motion. (Court's Doc. No. 25). It was not clear that Tischler intended her November 17, 2008, filing to be a response to Defendants' Motion. Accordingly, the Court gave Tischler an opportunity to file a supplemental response to Defendants' Motion. Tischler was specifically instructed she "must present evidence that she appealed the

denial of her grievances regarding her claims to the Director of the Department of Corrections prior to December 20, 2007." (Court's Doc. No. 26, p. 3). Instead of responding to Defendants' Motion, Tischler submitted a Fourth Amended Complaint attaching over 300 pages of grievances and other supporting documentation. (Court's Doc. No. 27).

The Court has reviewed all the documents submitted by Tischler with her Fourth Amended Complaint and her November 17, 2008, response. Tischler has not produced any evidence of an appeal to the Director of the Department of Corrections.

The Court finds, therefore, that Tischler did not properly complete the grievance process prior to filing this lawsuit. Dismissal is required when a plaintiff does not timely exhaust administrative remedies. 42 U.S.C. § 1997e(a); McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002).

III. Certification Regarding Appeal

The Federal Rules of Appellate Procedure provide as follows:

> A party who was permitted to proceed in forma pauperis in the district-court action . . . may proceed on appeal in forma pauperis without further authorization, unless:
>
> (A) the district court – before or after the notice of appeal is filed – certifies that the appeal is not taken in

> good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding....

Fed. R. App. P. 24(a)(3)(A).

Analogously, 28 U.S.C. § 1915(a)(3) provides "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." The good faith standard is an objective one. See Coppedge v. United States, 369 U.S. 438, 445 (1962). A plaintiff satisfies the "good faith" requirement if he or she seeks review of any issue that is "not frivolous." Gardner v. Pogue, 558 F.2d 548, 551 (9th Cir. 1977) (quoting Coppedge, 369 U.S. at 445). For purposes of section 1915, an appeal is frivolous if it lacks any arguable basis in law or fact. Neitzke, 490 U.S. at 325, 327; Franklin v. Murphy, 745 F.2d 1221, 1225 (9th Cir. 1984). "[T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." Walker v. O'Brien, 216 F.3d 626, 631 (7th Cir. 2000).

Review of the record plainly reveals that there is no evidence indicating that Tischler exhausted her administrative remedies. It would be frivolous to seek review of the dismissal for failure to exhaust.

Tischler's failure to exhaust administrative remedies is so clear no reasonable person could suppose an appeal would have merit. Therefore, this Court will certify that any appeal of this matter would not be taken in good faith.

Accordingly, the Court issues the following:

RECOMMENDATION

1. Defendants' Motion to Dismiss (Court's Doc. No. 22) should be **GRANTED** and Plaintiff's Amended Complaints (Court's Doc. Nos. 16 and 27) should be is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust administrative remedies.

2. The Clerk of Court should be directed to close this matter and enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

3. The Clerk of Court should be directed to have the docket reflect that the Court certifies pursuant to Fed.R.App.P. 24(a)(3)(A) that any appeal of this decision would not be taken in good faith. Tischler's failure to exhaust administrative remedies is so clear no reasonable person could suppose an appeal would have merit.

4. At all times during the pendency of this action, Tischler SHALL IMMEDIATELY ADVISE the Court of any change of address and its effective date. Such notice shall be captioned "NOTICE OF CHANGE OF ADDRESS." The notice shall contain only information pertaining to the change of address and its effective date, except if Tischler has been released from custody, the notice should so indicate. The notice shall not include any motions for any other relief. Failure to file a NOTICE OF CHANGE OF ADDRESS may result in the dismissal of the action for failure to prosecute pursuant to Fed.R.Civ.P. 41(b).

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Findings and Recommendation within ten (10) business days of the date entered as indicated on the Notice of Electronic Filing. Any such filing should be captioned "Objections to Magistrate Judge's Findings and Recommendation."

A district judge will make a de novo determination of those portions of the Findings and Recommendation to which objection is made. The

district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendation. Failure to timely file written objections may bar a de novo determination by the district judge and may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

This Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed.R.Civ.P. 4(a)(1), should not be filed until entry of the District Court's final judgment.

DATED this 10th day of February, 2009.

/s/ Carolyn S. Ostby
Carolyn S. Ostby
United States Magistrate Judge